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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 429 and 430

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
Petitioners,

vs.

INLAND STEEL COMPANY, A CORPORATION,
Respondent.

BRIEF OF INLAND STEEL COMPANY, RESPONDENT, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD, PETITIONERS.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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   (a) though they successfully maintained on the first appeal that the trial court's finding of a value of $604.17 a share should be increased.. 4

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5. No weight should be given to the trial court's finding of a value of $2350 a share, because it is based on pure guesswork made necessary by an incomprehensible rule of damages established in the first instance by the Court of Appeals, instead of the trial court 6

6. Rule 52(a) is not applicable for the further reason that the question of what criterion should be applied to determine value is a question of law..... 7

7. If Rule 52(a) governing findings of fact is applicable, the rule was violated on the first appeal when the Court of Appeals set aside the trial court's finding that the value of the capital stock of the Steamship Company was its asset value of $604.17 a share. The original error, rather than the second error, must be corrected 9

8. The Court of Appeals has undoubtedly "departed from the accepted and usual course of judicial proceedings" within the meaning of this Court's Rule 38, as contended by the Lebolds, but that is a reason for granting the request of the Steel Company in Dockets 427 and 428 for a review of the entire case on the merits and is not a reason for granting a review restricted to the question of whether the allowance of damages should be enhanced by reinstating a valuation which the trial court arrived at by a quotient verdict 11

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Both sides to this controversy are seeking a review in this Court by certiorari, but they advance different reasons to support their petitions and have wholly different motives.

An investment of $29,500 by petitioners' father in Inland Steamship Company produced dividends of $520,657.00 and a liquidating dividend of $178,230.15, or a total of $698,887.15, during a period of twenty-four years (R. 101 and O. R. 130). This astounding profit was admittedly due to the fact that the Steel Company filled the cargo boats of the Steamship Company to

capacity throughout each shipping season, paid it going rates and furnished executive supervision, clerical services and office space and facilities free of charge (R. 47, 92 and 141). There was no contract of any kind obligating the Steel Company to continue this unusual arrangement (Stipulation at O. R. 194), and in 1935 the Steel Company tried to put an end to it by either purchasing the minority stock interests of the Lebolds in the Steamship Company or selling its majority interest to them for $700 a share. The Lebolds refused to sell or to buy (O. R. 53, 79, 97 and 165-66); and thereupon the Steel Company proceeded to dissolve the Steamship Company as permitted by the law of the State of its incorporation. The physical properties of the Steamship Company were sold at a fairly conducted dissolution sale and were bid in by the Steel Company as the only bidder at a price which the petitioners admit was a fair price (R. 57). The other assets of the Steamship Company were liquidated, debts and taxes were paid and there was a ratable distribution to all stockholders (O. R. 130).

The object of Inland Steel Company in Dockets 427 and 428 is to set aside an adjudication by the Court of Appeals that the petitioners, who grew rich on the traffic of Inland Steel Company to the extent of dividends of $698,887.15 on an investment of $29,500, were defrauded by the Steel Company because it did not pay to them an additional amount determined by valuing the capital stock of the Steamship Company by means of a capitalization of its exorbitant earnings. The jurisdiction of this final tribunal is invoked to remove the stigma of this incredible adjudication. It is not only wrong, but clearly comes within the scope of the reasons which require that this Court exercise its jurisdiction by granting certiorari. The decision of the Court of Appeals is squarely against the settled law of West Virginia, where the Steamship Com-

pany was incorporated, and is based upon a refusal, contrary to decisions in the Fourth Circuit and the Eighth Circuit, to give effect to a stipulation between the parties (*Norfolk National Bank* v. *Commissioner*, 4 Cir. 66 F. (2d) 48; *Nelson* v. *United States*, 8 Cir. 131 F. (2d) 301.) The stipulation (O. R. 194 and 196) that there was no contract of any kind obligating the Steel Company to give the Steamship Company any traffic to transport and that without such traffic the Steamship Company would have incurred substantial yearly net losses, unquestionably prohibits an ascertainment of value by means of a capitalization of past earnings and limits the rights of the stockholders upon dissolution to a fair participation in the assets which the Steamship Company owned and was able to sell and convey to another.

The Lebolds as petitioners in Dockets 429 and 430 have requested this Court to grant certiorari, but do not want a review of the controversy on the merits. Their sole object is to enlarge their recovery of $299,618.82 in the Court of Appeals (R. 225-26) by reinstating the judgment entered by the trial court in the amount of $684,341.32 (R. 144) on the ground that the Court of Appeals had no right to modify a finding of the trial court as to value. Rule 52(a) of the Federal Rules of Civil Procedure is relied upon to support the claim that this Court should grant certiorari in order to increase the damages allowed by the Court of Appeals. This rule provides that findings of fact by a trial court shall not be set aside on appeal unless "clearly erroneous". Counsel claim that the reduction in the number of dollars their clients may recover is a "shocking result" which occurred because of existing confusion and uncertainty as to the meaning of Rule 52(a). They want this Court to grant certiorari and write an opinion which will produce uniformity among all courts and judges as to

the meaning of the term "clearly erroneous". Incidentally, they want the judgment of the trial court restored.

There have been two occasions in this litigation when the petitioners maintained that the Court of Appeals could and should set aside findings of fact made by the trial court. The decree entered by Judge Igoe on December 9, 1940, dismissed the petitioners' bill of complaint for want of equity (O. R. 230). That decree was accompanied by numerous findings of fact (O. R. 223-228) which were attacked by the petitioners on appeal (O. R. 232-239). For example, the trial court found as a fact that when the Steamship Company was dissolved, "the value of its stock amounted to nothing more than the value of a distributive share of the physical assets of the company" (O. R. 226). This finding was attacked by the petitioners (O. R. 234) and their attack was successful. The Court of Appeals held, contrary to the finding of the trial court, that the capital stock of the Steamship Company had a value over and above its asset value of $604.17 a share (O. R. 130), and remanded the case to have the trial court determine that value and assess damages (*Lebold* v. *Inland Steel Company,* 125 F. (2d) 369).

A hearing on damages before Judge Igoe followed. The Court of Appeals in its reversing opinion laid down a rule of damages and emphatically directed the trial Judge to follow it, though that issue was not before the Court of Appeals on the appeal from a decree dismissing the bill for want of equity. The issue of damages should have been decided in the first instance by the trial court (*Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 609, 612). The Court of Appeals, however, not only stated a rule of damages but practically fixed the amount of damages by stating that the value of petitioners' stock in the Steamship Company was "in the neighborhood of $2,000 per share". The trial court, therefore, had no opportunity to make findings

on damages reflecting its own opinion. The record clearly shows that Judge Igoe does not agree with the views of the Court of Appeals (R. 31-32, 53 and 55-57). We do not know what he would have done if the Court of Appeals had merely reversed his decree, so that he would have been a free agent in passing upon the amount of liability.

The rule of damages laid down prematurely by the Court of Appeals appears in 125 F. (2d) 369, at page 375:

> "The damages to be allowed are the difference between what plaintiffs have received from the sale of the physical assets and what the stock was really worth as stock in a going prosperous concern continuing in business. Upon that rule the trial court will fix plaintiff's damages."

At the hearing on damages the trial Judge stated from the bench that he could not fix a value for the stock of the Steamship Company on the basis of past earnings without deciding how long the traffic arrangement which produced those earnings had to continue. The following colloquy between the Court and petitioners' counsel appears at R. 55:

> "The Court: Let us assume, because we must assume, the Appellate Court has said so, how long must they continue that arrangement? Are they to be burdened with that situation throughout all the years of their lives? Or can they bring it to an end? How far does that go on?
>
> Mr. Welton: We do not have to answer that question.
>
> The Court: Well, but I do."

The trial court found it difficult to decide the baffling question of how long the Steel Company had to continue an arrangement which the stipulation between the parties said was not contractual and therefore did not have to be continued at all. The stipulation also said that without the traffic arrangement with the Steel Com-

pany, substantial operating losses would have been incurred by the Steamship Company (O. R. 196), and the Court of Appeals did not say or intimate in its opinion that the Steel Company was in any way obligated to continue the relationship with its subsidiary. "To begin with, nowhere does the court say that Inland, once having placed traffic with the subsidiary, is bound to do so indefinitely" (University of Chicago Law Review, October 1942, p. 83). Nevertheless, the Court of Appeals told the trial court that the stock of the Steamship Company had to be valued on the basis of an assumption that the large earnings of the past would have continued if the corporation had not been dissolved. Not even a hint was given to the trial court regarding the all important question of how long the earnings would have continued in the absence of dissolution.

Judge Igoe avoided the difficult problem by making a finding in which he quoted the words "a going prosperous concern continuing in business" from the opinion of the Court of Appeals. He then set forth a minimum figure of $1500, a maximum figure of $3200, and split the difference, or, as petitioners' counsel prefer to say, he computed "an arithmetical mean" (p. 27). The minimum and maximum values used by the Court were both testified to by the petitioners' witnesses. They proved by Mr. Simons that the value of the capital stock of the Steamship Company was "at least $1500 a share" (O. R. 88), and proved by Mr. Hammond that the stock was worth $3200 a share" (R. 69).

The finding to which we refer is as follows:

> "The value of stock of Inland Steamship Company as stock in a 'going prosperous concern continuing in business', as of May 1, 1936, was not less than $1500 per share and not more than $3200 per share; the Court finds such value to be $2350 per share." (R. 142.)

$1500 + $3200 = $4700 ÷ 2 = $2350.

This method of valuation on its face appears to involve error clear enough to satisfy the requirements of Rule 52(a).

The valuation of $2350 a share resulted in a judgment for $684,341.32 (R. 144). The Steel Company appealed (R. 145). The Lebolds perfected a cross-appeal and for the second time during this litigation maintained that the Court of Appeals should set aside findings of fact made by the trial court. Their counsel filed a statement of points in which they said the trial court erred in finding as a fact that the stock of the Steamship Company was worth only $2350 a share, instead of finding it was worth not less than $3000 a share (R. 155). They argued in support of their cross-appeal that the Court of Appeals should set aside the trial court's finding of $2350 a share and find that the stock was worth $3100 a share (see Petition pp. 26-7). In other words, they asked the court to do the exact thing they now say is prohibited by Rule 52(a). When they thought there was a chance to change the finding of the trial court to their advantage, Messrs. Strawn, Warden and Welton were of the unanimous opinion that Rule 52(a) did not prevent.

This Court has held that the question of what criterion should be employed to determine value is a question of law and not a question of fact.

(*Powers* v. *Commissioner of Internal Revenue*, 312 U. S. 359.)

In this case the question of whether a capitalization of past earnings should be employed as the criterion to determine the value of the capital stock of the Steamship Company is a question of law. It is a question of law which was decided by the Court of Appeals contrary to the statutory and judicial law of West Virginia and con-

trary to decisions of the Fourth Circuit and the Eighth Circuit that a court must recognize and give effect to a stipulation entered into between the parties acting by their authorized attorneys.

Counsel for petitioners are in error in maintaining that the trial court's finding of a value of $2350 a share was one of fact, but even if their contention in that respect were sound, this Court should deny their petition for certiorari. This is true for a number of reasons.

The Lebolds are in no position to assert their claim that Rule 52(a) has been violated. They have claimed throughout this litigation that the original finding of the District Court,—that their stock in the Steamship Company had no value over and above the amount paid to them as a liquidating dividend, presented a question of law subject to review on appeal. They are in no position now to claim that such a finding presents a question of fact. It is fundamental that a party who assumes a position in a legal proceeding and succeeds in maintaining it, cannot thereafter assume and try to enforce a contrary position simply because his interests have shifted. Such a shift is contrary to the fundamental principles of a court of equity.

Davis v. *Wakelee*, 156 U. S. 680.
United States v. *Prentiss & Co.*, 288 U. S. 73.
United States v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 282 U. S. 311.

In *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Company*, 240 U. S. 251, there were two appeals and two applications for certiorari. The trial court dismissed a bill to enjoin infringement of a trade-mark and for an accounting of damages and profits. The Court of Appeals reversed and remanded the case for the accounting. A petition for certiorari was denied. The accounting proceeded and the trial court entered a judgment for nominal

damages. The Court of Appeals reversed and a decree for substantial damages was entered. A second petition for certiorari was filed and was granted.

The Court in its opinion pointed out that the first petition for certiorari related to a decree which was not final and said that fact alone furnished sufficient ground for denial of the application. The Court then said at page 258:

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the District Court and the Court of Appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

If counsel are correct in maintaining that the valuation of the stock of the Steamship Company presents an issue of fact and that Rule 52(a) prohibits a change in the finding of the trial court, then the rule of this Court requires that the original error be corrected and that the trial court's first valuation of $604.17 a share be restored. The decision of the Court of Appeals on the first appeal may have become the law of the case so far as that court is concerned, but it is not the law of the case in this Court. "Of course this court, at least, is free when the case comes here." (Holmes, J. in *Messenger* v. *Anderson*, 225 U. S. 436, 445.)

The Lebolds are seeking a review on the ground that the Court of Appeals erred, to their prejudice, by reducing the trial court's valuation of $2350 a share to $1350 a share, but their own argument demonstrates that the

original error occurred when the Court of Appeals set aside the trial court's value of $604.17 a share. This original error was, of course, very much to their advantage. It is a reason for granting the petition of the Steel Company in dockets 427 and 428 and is not a reason for granting a review to the parties who were benefited by the original error.

There are further reasons which should induce this Court to deny certiorari to the petitioners even if they are correct in maintaining that the trial court's finding as to the value of the stock of the Steamship Company is one of fact. The trial court's finding of a value of $2350 a share is based on an evasion of the real problem which confronted the Court and upon a quotient verdict, which is clearly erroneous within the meaning of Rule 52(a). The finding in question does not in fact represent the views of the trial judge, but only what he did more or less under duress, because the Court of Appeals, instead of the trial court, made the original decision on the issue of damages.

The petitioners claim that the Court's ultimate conclusion of a value of $1350 a share is in obvious disagreement with evidentiary findings of the trial court, which were not found to be erroneous. This claim of disagreement or inconsistency is not satisfactorily demonstrated in either the petition or the brief. Even if the contention were sound, certiorari should not be granted to the petitioners, because here also the original error occurred in the decision on the first appeal. A multitude of evidentiary findings of fact appearing at O. R. 223-228 are inconsistent with the ultimate conclusion on the first appeal that the stock of the Steamship Company had a value in excess of its asset value. The trial court found as a fact that the Steel Company was under no obligation to give business to the Steamship Company, that the

Steamship Company with its one-customer relationship had no good will, and could not be successfully operated without the business of the Steel Company (O. R. 225-6). The Court of Appeals did not set aside such evidentiary findings, but nevertheless set aside the trial court's ultimate finding that the stock of the Steamship Company was worth only its asset value or $604.17.

The petitioners further claim that this litigation comes within Rule 38 of this Court, which indicates that a review by certiorari will be granted when a Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision".

We agree that the Court of Appeals has departed from the accepted and usual course of judicial proceedings. Four opinions by the Court were required to dispose of this controversy (Appendices A, B, C and D to Petition in Dockets 427 and 428). By the second opinion (Appendix B) the Court of Appeals adopted a rule of damages, though that issue was not before it and was not argued, and directed the trial court to follow it. The rule of damages thus adopted was ambiguous. The trial judge resorted to mere guesswork in applying it and arrived at a value of $2350 a share. On the second appeal one judge thought this valuation was supported by the evidence, but the other two judges thought the valuation should be reduced to $1350 a share. The dissenting judge then wrote an opinion to express the views of the majority and the case was reversed and remanded for a reduction in damages (Appendix C). The Court's conclusion was based, at least in part, on a point never argued by either side and not mentioned in the Court's opinion (Petition, p. 10). Both sides asked for rehearing (R. 179 and 195). Rehearing was denied, but the Court wrote a fourth opinion

(Appendix D) changing its former opinion and directing that the case should not be remanded as previously ordered (R. 223). In all of its opinions the Court persistently ignored and refused to answer or even mention the controlling points in the case (see petition of Inland Steel Company for rehearing, R. 179-193).

The foregoing we believe demonstrates a radical departure from the usual course of judicial proceedings. Courts do not ordinarily decide important issues not before it, ignore the real points in a case, render opinions by a dissenting judge speaking for the majority, and base the final decision upon a point not mentioned in the opinion and not argued by either party.

These irregularities, however, do not warrant the granting of the Lebolds' petition for certiorari. Their limited petition seeking merely an enhancement in damages does not reach the irregularities which bring the situation within this Court's Rule 38. The lower court's departure from the usual course of procedure can be cured only by granting a review by certiorari to the Steel Company, as requested in Dockets 427 and 428. The record made at the hearing on damages conclusively demonstrated that the decision on the first appeal was erroneous and that the Steel Company is not liable in any amount whatever. The Court of Appeals should have so held, instead of merely decreasing the amount of the judgment entered by the trial court in an effort to carry out the ambiguous rule of damages. The reduced judgment is based solely and entirely upon the false assumption that the Steel Company was obligated to continue the traffic arrangement which was responsible for the past earnings of the Steamship Company. The Court had no right to base its decision upon an assumption or premise which is contrary to the stipulated facts that there was no contractual arrangement of any kind between the two corporations and that without the traffic of the Steel Company substantial

yearly net losses would have been incurred by the Steamship Company (O. R. 194 and 196).

We emphatically disagree with the statement made at page 16 of the Lebolds' petition that computations of earnings were put in evidence by the respondent in violation of a stipulation. The stipulation referred to appears at O. R. 190-198. There is nothing whatever in that stipulation prohibiting, either directly or by implication, the introduction of respondent's exhibits which appear at R. 116-127. Counsel for the petitioners made no such claim when the exhibits were offered in evidence (R. 70-100).

We respectfully request that this brief in Dockets 429 and 430 be considered in connection with the petition of Inland Steel Company for review by certiorari in Dockets 427 and 428. In view of the fact that this Court assigned two docket numbers to our petition, we request that it be regarded, if that be necessary for technical reasons, as a petition for two writs of certiorari to review two identical judgments which were entered by the Court of Appeals (R. 225-226).

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